81-2246

No. _____

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In The

Supreme Court of the United States

October Term 1981

GARDY CONSTANT,

Petitioner,

vs.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court commit error in deciding that the prosecutor's comments on the defendant's demeanor while sitting at the witness table and his comments on matters outside of the record were proper?

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PETITION FOR WRIT OF CERTIORARI

I. JURISDICTION

Jurisdiction of the United States Supreme Court is sought pursuant to 28 U. S. C. 1254.

II. STATEMENT OF THE CASE

On January 17, 1978, an information was filed in El Paso County Court charging the petitioner with second degree burglarly, felony theft, first degree sexual assault, and crime of violence.

Following a trial to a jury, the defendant was found guilty of these charges and was sentenced on April 24, 1978, to a sentence of 19 to 29 years in the Colorado State Penitentiary.

Subsequent to the defendant's sentencing, a Notice of Appeal was timely filed and the petitioner's Appeal was perfected to the Colorado Court of Appeals. On June 19, 1980, the Court of Appeals for the State of Colorado reversed the petitioner's conviction and remanded the case for a new trial. The basis of said reversal was the prosecutor's improper comments on the petitioner's demeanor while sitting at counsel table during the course of the trial.

A petition for rehearing was filed and granted on August 7, 1980. The initial opinion of the Court of Appeals dated June 19, 1980, was withdrawn and a new opinion was substituted. The new opinion was substantially the same except that one justice dissented (a copy of the decision of the Court of Appeals is attached hereto as Appendix A). On August 21, 1980, a new Petition for Rehearing was denied.

Within the period prescribed by law, a Petition for Writ of Certiorari was filed by the People of the State of Colorado to the Supreme Court of Colorado. The Supreme Court of Colorado granted said Writ and on March 29, 1982, the Supreme Court reversed the Court of Appeals and remanded the case with directions (a copy of the

Supreme Court's decision is attached hereto as Appendix B).

On April 9, 1982, the petitioner filed a Petition for Rehearing and on April 19, 1982, the respondent's Petition for Rehearing was denied.

On April 20, 1982, the petitioner filed a Motion for Stay of Mandate, and subsequently said motion was granted with a stay of the mandate until May 24, 1982, and for such additional and further time as may be set by the Supreme Court of the United States.

III. STATEMENT OF FACTS

The following statements made by the prosecuting attorney at the trial of the petitioner have been the central focus of all of the proceedings in the instant case. The petitioner has argued, from the beginning, that these statements improperly comment upon the defendant's demeanor *while sitting at counsel table* during the course of the trial and further are improper in that they comment on matters clearly outside of the record:

> *And Mr. Constant is laughing again like he did before.* This whole trial is a joke to him. (F.830).
>
> And Ms. Baird makes the statement that in this trial Mr. Constant has been painfully honest with you. *You have been able to observe his demeanor and while Mary was testifying, he was generally chuckling to himself.* (F.836).
>
> If she was just mad at him . . . would she . . . testify before all you people, and all those people and these people, and watch him laugh at her while she was testifying, . . . (F.865).

Their demeanor on the witness stand in the courtroom—Mary did pretty well in telling me what happened to her. It was a very personal thing that happened to her. She used a few Kleenexes and she was tearing them up with her hands. I think she only had a couple of tears. What did Gardy Constant do, *he laughed when Mary testified he just kept sitting there—he just kept laughing at her,* just like after he rolled off her and she said 'why?' (F.868).

Is he right-handed? He told me he was left-handed. I think that you have observed him writing notes during the trial. He writes with his right hand. (F.844 (emphasis added)).

In addition to these comments, the prosecutor also made the following inflammatory statements:

. . . ladies and gentlemen, you should be outraged that she (the defendant's attorney) can tell you that what that man said is true and what Mary Durganz said is absurd. (F.827 (parenthesis added)).

Ms. Baird (the defendant's attorney) thinks it inconsistent that she said on direct testimony she was led into the bedroom with a knife at her throat . . . (F.835 (parenthesis added)).

Mr. Constant is proud of his sexual conquests. (F.829).

He (the defendant) doesn't have respect for this courtroom. He doesn't have respect for you. He doesn't have any respect for her or this system. (F.836, 837 (parenthesis added)).

This (the alleged offense), happened on January 7. He has had over two months to come up with something to answer all this physical evidence. And he comes up with an answer. His friends said he was a straight 'A' student. I guess he has an answer for everything. And those answers, ladies and gentlemen, are formulated because he knows what is against him. (F.838 (parenthesis added)).

> And his attorney has the absurb suggestion that Mary got mad and threw them out there . . . but he has to come up with something. He can't say the police lied so he has got to make up some absurd story. (F. 843).
>
> And finally he said, 'I have a bet that I would go to some girl's apartment and take all her jewelry and come three times' now, could Mary dream that story up on her own? I don't believe that anybody could dream that story up except, maybe him. (F.862).

The question presented for review is did the Colorado Supreme Court properly rule that a prosecuting attorney may comment upon the defendant's demeanor while sitting at the witness table during the course of the trial and further comment upon matters that are outside of the record.

V. ARGUMENT

The previously cited comments, and particularly their propriety, have been the central point of contention for the litigants in this action.

The issue of whether a prosecuting attorney may comment upon a witness' demeanor *while sitting at counsel table during the course of the trial,* has not been the subject of a great deal of litigation. To the extent, however, that this matter has been addressed, there appears to be a split in authority. Should the decision of the Colorado Supreme Court be allowed to stand, it would allow prosecutors, across the country, to comment upon matters that have heretofore been off limits. It should be stressed, that we are not talking about comments directed to the defendant's demeanor *while on the witness stand.* In that instant case, the prosecuting attorney commented upon the defendant's demeanor *while sitting*

on counsel table. In addition, the prosecuting attorney used the defendant's conduct, while sitting at counsel table, to prove a fact in contention, to wit: whether or not the defendant was right-handed or left-handed (F.844).

It should also be pointed out, that contrary to the opinion of the Colorado Supreme Court, it is highly disputed whether or not the defendant did actually laugh while the complaining witness testified and during the prosecution's closing arguments. The record is *absolutely* silent on this point.

In the case of *United States v. Wright,* 489 F. 2d 1181 (C. A. D. C. 1973) the Court of Appeals, when faced with comments made by a prosecutor similar to the ones previously cited, stated the following:

> A defendant has no right to disregard the dignity, order and decorum of judicial proceedings [citations omitted]. But this does not mean that his courtroom behavior off the witness stand is any sense legally relevant to the question of his guilt or innocence of the crime charged . . . that the jury witnesses the courtroom behavior in any event does not make it proper for the prosecutor to tell them with the court's approval that they may consider it as evidence of guilt. 489 F. 2d at 1186.

In 1916, in the case of *State v. Davis,* 190 S. W. 297 (1916), the Supreme Court of Missouri took a similarly dim view of this type of conduct. In that case, the court stated:

> In these statements counsel went clearly beyond the bounds of legitimate argument . . . his (the defendant's actions, physical expressions, etc., during his forced presence in the courtroom and at times other than when testifying, should not be commented upon. Such matters are outside the record and such arguments smack too much of an appeal to preju-

> dice and whether made for such purpose or not is clearly calculated to engender it. If this practice was permissible, a defendant would be in an ill position to protect himself unless per chance he possessed the attainments of a stage dignitary. If at an unpsychological moment he smiled, or shed a tear, or refrained from doing so, or, if at a given time bore one instead of another facial expression; or if, as state's counsel charged in the case, he left his defense to his counsel, instead of conducting it himself, he would suffer. It is not by these standards that innocence or guilt is determined. 190 S. W. 198.

It is important to note that in both of these cases, the defendant's conviction was overturned largely due to the prosecutor's improper comments.

In reaching its decision in this case, the Colorado Supreme Court stated "that a prosecutor may draw reasonable inferences as to the demeanor and credibility of witnesses". The Court goes on to state that the prosecutor's arguments are consistent with the instruction given to the jury which permits it to consider the demeanor of a witness for credibility purposes.[1] As the petitioner pointed out in his Petition for Rehearing in the Supreme Court, this instruction specifically states that a jury may consider a witness' demeanor while "upon the witness stand". It, in no way, authorizes the jury to consider

---

1 *Colo. J. I.* (Crim.) 3:8 (1974 rev.) provides:

> You are the sole judge of the credibility of witnesses including the defendant and of the weight to be given to the testimony of them. You should take into consideration the witnesses' means of knowledge; strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or inconsistency of their testimony; the motives actuating them; the fact, if it is a fact, that their testimony has been contradicted; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts

(Continued on following page)

the demeanor of a defendant while sitting at counsel table during the course of a trial. When one removes this instruction as a justification for the prosecutor's comments, one can only conclude that said comments are improper.

VI. CONCLUSION

If this decision is allowed to stand, and prosecutors are given authority to comment upon a defendant's demeanor while sitting at counsel table during a trial, might it not also be proper for a prosecutor to comment upon his behavior while walking into the courtroom or in the hallway outside the courtroom or perhaps in the men's room. A firm rule of law must be established that although it is proper to comment upon a witness or defendant's demeanor while on the witness stand, it is totally improper to comment about the conduct of the defendant while sitting at counsel table. To allow the latter type of comments, would place an impossible burden on the defendant. Additionally, the defendant in this case or a defendant in another case faced with similar comments has no ability to cross-examine or question the statements baldly asserted by the prosecuting attorney.

Respectfully submitted,

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(Continued from previous page)

and circumstances shown by the evidence which affects the credibility of their testimony. If you believe that any witnesses have willfully testified falsely to any material fact in this case, you may disregard all or any part of their testimony.

APPENDIX A

COLORADO COURT OF APPEALS

No. 78-805

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

vs.

GARDY CONSTANT,
Defendant-Appellant.

Appeal from the District Court of El Paso County
Honorable Bernard Baker, Judge

JUDGMENT REVERSED AND CAUSE REMANDED FOR NEW TRIAL
(Opinion filed and judgment entered on the 7th day of August, 1980 SEAL)

DIVISION II
Opinion by JUDGE KELLY
Smith, J., concurs
Sternberg, J., dissents

Prior Opinion Announced June 19, 1980 *WITHDRAWN*
Petition for Rehearing *GRANTED*

J. D. MacFarlane, Attorney General
William R. Rapson, Designated Counsel
Denver, Colorado

Attorneys for Plaintiff-Appellee

Karp & Goldstein
Kenneth H. Stern
Denver, Colorado

Attorneys for Defendant-Appellant

Gardy Constant appeals his conviction of second degree burglary, first degree sexual assault, and the finding that he committed a crime of violence. Constant argues that, even though there was no contemporaneous objection, remarks made by the prosecutor during his closing argument warrant reversal by this court. We reverse.

On five separate occasions during his rebuttal argument, the prosecutor referred to the defendant's demeanor and conduct at the defense table during the course of the trial. He attacked Constant's credibility by noting that the defendant laughed during the People's argument and during the testimony of the victim. Constant argues that these remarks were highly prejudicial and improperly referred to events which were outside of the record. We agree.

The defendant's behavior at the defense table is not evidence and, therefore, is an improper subject for comment in closing argument. *See People v. Sepeda*, 196 Colo. 13, 581 P. 2d 723 (1978). The fact that a defendant has testified and placed his character in issue in no way expands the prosecutor's area of comment to include inferences based on events beyond the scope of the evidence.

The People argue, however, that, absent contemporaneous objection, such prosecutorial comments are not so egregious as to constitute plain error. Under the circumstances of this case, we disagree.

Plain error, which may be noticed on appeal, although not raised before the trial court, is error which seriously affects substantial rights of the accused. Crim. P. 52(b); *People v. Barker*, 180 Colo. 28, 501 P. 2d 1041 (1972). Each case must be resolved based on the particular facts

and issues presented. Upon a reading of the record, a determination must be made whether the error contributed to the defendant's conviction. *People v. Barker, supra.*

Here, the record shows that the complaining witness and the defendant each related an extraordinary account of the events, materially different on the essential question whether the complaining witness consented. Thus, the main question before the jury was which of these witnesses testified truthfully. Even the trial judge, in addressing the defendant at sentencing, declared that he would be the "first to admit that it was a close case." Under these circumstances, the improper argument attacked Constant's believability, making the remarks highly prejudicial. The prejudicial effect was augmented by the frequency of the remarks during the rebuttal argument which the defendant had no opportunity to meet.

The People argue that *People v. Sepeda, supra,* prescribes a "higher standard of prosecutorial misconduct" in order to constitute plain error. *Sepeda* is not susceptible to this construction. While the court in *Sepeda* emphasizes that rarely will prosecutorial misconduct constitute plain error, the determination of whether the misconduct was plain error turns not on the nature of the misconduct but on the impact of the misconduct upon the result. *See People v. Barker, supra.* Thus, the more difficult the determination for the jury, the more wary the prosecutor must be that his conduct does not improperly influence the verdict, being ever mindful of his duty "to seek justice, not merely to convict." *People v. Walker,* 180 Colo. 184, 504 P. 2d 1098 (1972).

We are cognizant of *People v. Ferrell*, — Colo. —, — P. 2d — (announced June 23, 1980), but regard it as distinguishable. There the comments by the prosecutor were not pervasive throughout the argument, and there was no indication that the remarks were egregious enough to affect the result.

Constant also argues that the evidence was insufficient to support the jury's verdict. Viewing the evidence as a whole and in the light most favorable to the prosecution, we have determined that it is sufficient to support the conclusion by a reasonable mind that the defendant was guilty of the charge beyond a reasonable doubt. *See People v. Bennett*, 183 Colo. 125, 515 P. 2d 466 (1973).

We have reviewed Constant's argument that the trial court erred in failing to exclude evidence that jewelry belonging to the victim and allegedly taken from her apartment was found in Constant's car, and find it to be without merit. *See People v. Anderson*, 184 Colo. 32, 518 P. 2d 828 (1974).

In view of our conclusion, we need not address Constant's other assignment of error.

The judgment is reversed and the cause is remanded for a new trial.

JUDGE SMITH concurs.

JUDGE STERNBERG dissents.

JUDGE STERNBERG dissenting:

I believe that the conviction should be affirmed for two reasons. First, the nature of the defense—consent—and the testimony presented in support of it, taken with

the defendant's demeanor in the courtroom, invited the comments by the prosecutor and thus should not be used as a basis for reversal. Secondly, in my view the remarks, taken in context, are not so damning as to constitute plain error. *See People v. Sepeda,* 196 Colo. 13, 581 P. 2d 723 (1978), wherein it was stated that "rarely, if ever," are remarks made in argument "so egregious as to constitute plain error."

Even if the prosecutor's remarks constituted error, which conclusion I disagree with in the context of this case, the remarks are not plain error. Therefore, I would affirm the conviction.

APPENDIX B

IN THE SUPREME COURT OF COLORADO

No. 80SC250

March 29, 1982

THE PEOPLE OF THE STATE OF COLORADO,
Petitioner,

vs.

GARDY CONSTANT,
Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

J. D. MacFarlane, Attorney General
Richard F. Hennessey, Deputy Attorney General
Mary J. Mullarky, Solicitor General
Denver, Colorado

Robinson, Waters, O'Dorisio & Rapson, P.C.
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Attorneys for Petitioner

Karp, Goldstein & Stern
Kenneth H. Stern
Denver, Colorado

Attorneys for Respondent.

JUSTICE ERICKSON delivered the Opinion of the Court.
JUSTICE LOHR specially concurs.

We granted Certiorari to review *People v. Constant*, — Colo. App. —, 623 P. 2d 63 (1980), which granted the defendant, Gardy Constant, a new trial because the prosecutor's closing argument called the jury's attention to the fact that the defendant was laughing while the complaining witness testified and during the prosecution's closing argument. We reverse the judgment of the court of appeals and remand to the court of appeals with directions to affirm the judgment of conviction.

The defendant was convicted by a jury of first-degree sexual assault,[1] second-degree burglary,[2] and crime of violence,[3] and was thereafter sentenced to the Colorado State Penitentiary. The sole issue before us is whether the prosecutor's comments in closing argument regarding the defendant's demeanor at trial constituted plain error which requires reversal and a new trial. No contemporaneous objection was made by defense counsel to the prosecution's argument and no error was asserted in the defendant's motion for a new trial. In our view, the court of appeals erred in reversing the defendant's conviction because the alleged prosecutorial misconduct was not plain error.

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1 Section 18-3-402, C. R. S. 1973 (1978 Repl. Vol. 8).

2 Section 18-4-203, C. R. S. 1973 (now in 1978 Repl. Vol. 8).

3 Section 16-11-309, C. R. S. 1973 (1978 Repl. Vol. 8).

I.

The Factual Background

The factual dispute in this case centers on whether the complaining witness consented or was forced at knife-point to submit to sexual intercourse with the defendant. At trial, the testimony of the complaining witness and the defendant was in sharp conflict, and their credibility was the primary issue for the jury to determine. A review of the testimony of both the complaining witness and the defendant provides the foundation for the legal conclusions in this opinion.

The complaining witness testified that she returned to her second floor apartment in Colorado Springs, Colorado, in the early morning hours of January 7, 1978. When she unlocked the front door, she saw the defendant standing in her kitchen with a knife in his hand. She testified that the defendant then forced her into the bedroom by putting his arm around her neck and the knife to her throat. She said that he then undressed her and forced her to submit to sexual intercourse. She also described how the defendant covered her face with a curtain while he was having intercourse with her. When she asked the defendant why he raped her, he laughed and said "You wouldn't believe me."

The defendant then permitted the complaining witness to dress, and he remained in the apartment for a short period of time. He apologized for raping her and said that he had done it to win a bet from some college friends which required him to "go into a lady's apartment, and take some of her jewelry, and come three times and then leave." At first the defendant prevented the com-

plaining witness from telephoning the police, but he eventually permitted a call to be completed. He then left and was arrested outside the apartment. Thereafter the police found the defendant's car keys on a ledge outside a window of the apartment, and located some of the complaining witness' jewelry in the defendant's car. The police also recovered a knife and a curtain near the complaining witness' bed.

The defendant admitted being in the apartment and having sexual intercourse with the complaining witness but testified that no force was used. He said that he had been drinking heavily that night and decided that he would visit an old girl friend. When he arrived at what he believed to be her apartment, he found the door unlocked and entered. He thought that she had been negligent in leaving the door unlocked and, to teach her a lesson, took her jewelry and some other items and put them in his car. He then returned to the apartment, fixed a snack in the kitchen, and waited for her to return. According to the defendant, he was washing a knife when the complaining witness came home. He was embarrassed when he did not recognize her and realized that he was in the wrong apartment. He then decided that he should "get on good terms" with her because of his mistake in taking her jewelry, and suggested that they "go to bed" since she seemed "pretty friendly." The defendant testified that the complaining witness responded by saying "as handsome as you are, you don't need that knife," and led him to the bedroom.

He testified that he covered her face with a curtain while having intercourse "because he didn't like the way she looked." Afterwards, the defendant admitted that while he was "reminiscing about the evening," he "giggled

a little." In his view, the complaining witness thought that he was laughing at her, became angry, and called the police. He said he waited for the police to arrive because he did not rape her, but only consented to have intercourse.

II.

The Closing Argument

It is not disputed that the defendant laughed while the complaining witness testified and also laughed during the prosecution's closing argument. In closing argument, the prosecutor pointed out the inconsistencies in testimony and the defendant's incredible theory of consent. In attacking the defendant's credibility, the prosecutor characterized his testimony as a deliberate fabrication designed to mislead the jury which was motivated by his desire to evade responsibility for a criminal act. The court of appeals concluded that the following statements in the prosecution's closing argument required reversal of the defendant's conviction:

> "And *Mr. Constant is laughing again like he did before.* This whole trial is a joke to him." (Emphasis added.)
>
> • • •
>
> "And [defense counsel] makes the statement that in this trial Mr. Constant has been painfully honest with you. You have been able to observe his demeanor, and *while [the complaining witness] was testifying he was generally chuckling to himself.*" (Emphasis added.)
>
> • • •
>
> "Let's look at [the complaining witness'] motives in testifying. It's one of the things in credibility you can look at. If she was just mad at him, because

> he said she was ugly, would she tell it to two police officers at length, would she go through a vaginal examination . . . and testify before all you people, and all those people, and these people, and *watch him laugh at her while she was testifying*, and go to counseling at Victim Services Bureau?" (Emphasis added.)
>
> • • •
>
> "Their demeanor on the witness stand in the courtroom—[the complaining witness] did pretty well in telling you what happened to her. It was a very personal thing that happened to her. She used a few Kleenexes and she was tearing them up with her hands. I think she only had a couple of tears. *What did Gardy Constant do? He laughed. [The complaining witness] testified that he just kept sitting there —he just kept laughing at her, just like after he rolled off her and she said, 'Why?' and he just laughed.*" (Emphasis added.)

Defense counsel made no objection to any of the prosecutor's remarks, and none of the references to the defendant's laughter were asserted as grounds for reversal in the defendant's motion for a new trial. The error was asserted for the first time on appeal.

In closing argument, the prosecutor also stressed the need for the jury to determine the credibility of the complaining witness and the defendant, and reviewed the court's instruction to the jury on the credibility of witnesses. *Colo. J.I.* (Crim.) 3:8 (1974 rev.). Counsel can with propriety comment on how well and in what manner a witness measures up to the tests of credibility set forth in the instruction. *Valdez v. People*, 168 Colo. 429, 451 P. 2d 750 (1969). Moreover, to determine whether the prosecutor's closing argument is improper, the remarks complained of must be reviewed in light of the

evidence which is before the jury. *Stout v. People*, 171 Colo. 127, 464 P. 2d 872 (1970). *See also State v. Knapp*, 14 Wash. App. 101, 540 P. 2d 898 (1975). A determination of whether the prosecutor's closing argument is improper depends upon the nature of the comment and on whether the jury's attention has been directed to something which it is not entitled to consider. *State v. Knapp, supra*. *See also State v. Padilla*, 101 Idaho 713, 620 P. 2d 286 (1980).

Here, the prosecutor commented on the defendant's behavior at the defense table. He referred to the fact that the defendant laughed during the time that the complaining witness testified and during the prosecution's rebuttal argument. The prosecution's reference to the defendant's conduct at the defense table were brief. Moreover, the defendant's conduct was committed in the presence of the jury. In *People v. Dykes*, 66 Ill. App. 3d 403, 383, N. E. 2d 1210 (1978), *cert. denied*, 444 U. S. 940, 100 S. Ct. 292, 62 L. Ed 2d 305 (1979), a conviction for rape and other sexual misconduct was affirmed when the defendant did not testify in his own defense and laughed at the rape victim while she was testifying. In the course of his closing argument, the prosecution in *Dykes* told the jury that they should let the defendant know by their verdict that "you don't consider this funny, you don't consider it a laughing matter." In reviewing the conduct, the Illinois court concluded that the prosecutor had not argued that the defendant's demeanor was evidence of guilt, but merely had pointed out the defendant's conduct to the jury. *Cf. United States v. Wright*, 489 F. 2d 1181 (D. C. Cir. 1973).

We agree that a prosecutor may draw reasonable inferences as to the demeanor and credibility of witnesses.

Based upon the facts of this case, the prosecution's argument is consistent with the instruction to the jury which permits the jury to consider the demeanor of witnesses for credibility purposes.[4] Therefore, even though "demeanor" is not technically evidence, the jury is not only permitted but also affirmatively instructed to consider it in assessing witness credibility.

Persuasive to our decision is the fact that the defendant elected to take the witness stand and testify in his own defense. His demeanor and credibility were therefore proper subjects for the jury to consider. In addition, we note that the prosecutor argued that the defendant's demeanor was evidence of his credibility and not that his demeanor was itself evidence of guilt. Since the defendant's demeanor was proper for the jury to consider, the determinative issue is whether the prosecutor's references to the defendant's demeanor in laughing at the defense table as well as on the witness stand is plain error.

---

4 4 *Colo. J. I.* (Crim.) 3:8 (1974 rev.) provides:

> You are the sole judge of the credibility of witnesses including the defendant and of the weight to be given to the testimony of them. You should take into consideration the witnesses' means of knowledge; strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or inconsistency of their testimony; the motives actuating them; the fact, if it is a fact, that their testimony has been contradicted; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affects the credibility of their testimony. If you believe that any witnesses have willfully testified falsely to any material fact in this case, you may disregard all or any part of their testimony.

III.

Plain Error

The court of appeals concluded that the prosecution's argument, which pointed out that the defendant was laughing while the complaining witness testified and during the closing argument, was so egregious as to constitute plain error when the "impact of the misconduct upon the result is emphasized." The analysis of the court of appeals is not correct.

Prosecutorial misconduct provides a basis for reversal because of plain error only where there is a substantial likelihood that it affected the verdict or deprived a defendant of a fair and impartial trial. In making such a determination, a number of factors must be considered. *See Donnelly v. DeCristoforo*, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Of significance to us is the fact that defense counsel did not make a contemporaneous objection to the prosecutor's comments and failed to assert in a motion for new trial that the closing argument of the prosecutor was improper.

In *People v. Ferrell*, — Colo. —, 613 P. 2d 324 (1980), we held "where the alleged error consists of prosecutorial misconduct during closing argument and a proper mistrial objection is made and preserved at the trial court level, a new trial is in order only if the trial court abused its discretion." *See also People v. Sepeda*, 196 Colo. 13, 581 P. 2d 723 (1978).

When the alleged error consists of prosecutorial misconduct and was not preserved by a contemporaneous objection, it will not be considered on appeal unless it was

plain error affecting the substantial rights of the defendant. *See Vigil v. People,* 196 Colo. 522, 587 P. 2d 1196 (1978). *See also People v. Talbot,* 64 Cal. 2d 691, 414 P. 2d 633, 51 Cal. Rptr. 417 (1966), *cert. denied* 385 U. S. 1015, 87 S. Ct. 729, 17 L. Ed. 2d 2d 551 (1967). In this case, the alleged error was raised for the first time on appeal. Unless a prosecutor's misconduct is flagrant or "glaringly or tremendously" improper, it is not plain error under Crim. P. 52(b) where no objection to the behavior was raised. *People v. Simbolo,* 188 Colo. 49, 532 P. 2d 962 (1975). *See also* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges,* 50 Tex. L. Rev. 629 (1972).

In *People v. Sepeda,* 196 Colo. 13, 581 P. 2d 723 (1978), we said:

> "The . . . improprieties noted above were not objected to at trial, and we have held on numerous occasions that prosecutorial misconduct in closing arguments rarely, if ever, is so egregious as to constitute plain error, within the meaning of Crim. P. 52 (b), so that we may consider it on appeal absent a contemporaneous objection. *See, e. g., People v. Plotner,* 188 Colo. 297, 534 P. 2d 791 (1975); *People v. Simbolo,* 188 Colo. 49, 532 P. 2d 962 (1975). We find no misconduct so flagrant as to constitute plain error." *Id.* at 25.

Similarly, under the circumstances of this case, we do not consider the prosecutor's comments during closing argument to be so egregious as to constitute plain error.

We have considered the defendant's other allegations of error and find them to be without merit.

Accordingly, we reverse the decision of the court of appeals and remand this case to the court of appeals with

directions to affirm the judgment of conviction against the defendant, Gardy Constant.

JUSTICE LOHR specially concurs.

No. 80SC250—*People v. Constant*

JUSTICE LOHR specially concurring:

I agree that under the circumstances presented here no plain error occurred when the prosecution made reference to the defendant's demeanor at the defense table. Because of that conclusion, it is unnecessary to extend the discussion further than to demonstrate the absence of plain error and I would not do so. I concu with part III of the majority opinion and join in the result.